FILE COPY
NOV
HAROLD B.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, Et Al.,
Petitioners

V.

C. MELVIN SHARPE, Et Al.,
Respondents

BRIEF FOR PETITIONERS

GEORGE E. C. HAYES
JAMES M. NABRIT, JR.
Counsel for Petitioners

JULIAN R. DUGAS
GEORGE M. JOHNSON
DORSEY E. LANE
HARRY B. MERICAN
HERBERT O. REID, JR.
JAMES A. WASHINGTON
Of Counsel

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

INDEX

BLEED THROUGH

BLURRED COPY

TABLE OF CASES CITED

AUTHORITIES CITED

NOTES

MISCELLANEOUS

UNITED STATES STATUTES AND CONSTITUTION

BLEED THROUGH

BLURRED COPY

UNITED STATES STATUTES AND CONSTITUTION—(Cont'd)

TREATY

STATE STATUTES AND CONSTITUTIONS

In The

Supreme Court of the United States

October Term, 1952

No. 413

Spottswood Thomas Bolling, Et Al.,
Petitioners

V.

C. Melvin Sharpe, Et Al.,
Respondents

BRIEF FOR PETITIONERS

OPINION BELOW

The final decree of The United States District Court for the District of Columbia is unreported, but appears in the Record (R. p. 19).

JURISDICTION

The final decree of the District Court was entered on April 9, 1951 (R. p. 19). The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was given on April 10, 1951 (R. p. 20). Briefs were filed by petitioners and respondents in the United States Court of Appeals for the District of Columbia Circuit. Before argument, before submission of the case for judgment on the briefs, and before judgment petitioners filed a Petition for Writ of Certiorari in this Court, asking that this Court review the judgment of the United States District

Court for the District of Columbia before judgment by the United States Court of Appeals for the District of Columbia Circuit. Certiorari was granted by order of this Court dated November 10, 1952.

This is an appeal from a decree in a civil action denying an injunction and, denying an application for a declaratory judgment holding that the action of respondents, under color of law, in refusing admission of minor petitioners to Sousa Junior High School solely on the basis of race or color was in violation of the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and also in violation of Title 8, United States Code, Section 43, and further was in violation of the Charter of the United Nations, Chapter 1, Article 1, Section 3, Article IX, Sections 55 and 56, and, denying an application for a declaratory judgment holding that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color in affording them educational opportunities and, dismissing petitioners' complaint on the ground that it failed to state a cause of action on which relief could be granted. The jurisdiction of this Court to review by writ of certiorari before judgment in the United States Court of Appeals is conferred by Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED

1. Whether the Federal Government in providing educational opportunities for pupils of the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color.

2. (a) Whether Acts of Congress which provide educational opportunities for pupils in the District of Co-

BLEED THROUGH

BLURRED COPY

lumbia compel their segregation solely on the basis of race or color.

(b) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia compel their segregation solely on the basis of race or color, whether these acts are unconstitutional.

(c) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia permit segregation solely on the basis of race or color, whether to the extent that this legislation is thus permissive its implementation by actions of respondents is unconstitutional.

3. Whether the actions of respondents in refusing to admit minor appellants to Sousa Junior High School solely on the basis of race or color violated petitioners' rights guaranteed them by the Constitution and Laws of the United States.

4. Whether the United States District Court for the District of Columbia erred, in denying petitioners' application for an injunction and for a declaratory judgment, and in granting respondents' motion to dismiss petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

TREATY AND STATUTES INVOLVED

Treaty:

Article 1(3), 2(2), 55(c) and 56 of the United Nations Charter, 59 Stat. 1035 et seq.

Statutes:

(A) Title 8, United States Code, Sections 41 and 43.

(B) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Sec. 6, as amended June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 2 (D. C. Code 1951 Ed., Title 31, Secs. 1110, 1111, 1112, 1113).

(C) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 2 (D. C. Code 1951 Ed., Title 31, Sec. 1109).

(D) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 7, as amended by Act of June 4, 1924, 43 Stat. 370, Chapter 250, Art. 3 (D. C. Code 1951 Ed., Title 31, Sec. 115).

(E) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of Oct. 6, 1949, Public No. 353, 81st Congress, 1st Session.

(F) Act of February 4, 1925, 43 Stat. 806, 807, Chapter 140, Art. 1, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs. 201, 207).

STATEMENT OF THE CASE

On the 11th day of September, 1950, and during the time when respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Columbia attended solely by white children, all of the minor petitioners, Negroes between the ages of 7 and 16 years, citizens of the United States, residents of and domiciled in the District of Columbia, within the statutory age limits for eligibility to attend the public schools of the District of Columbia and subject to the compulsory school attendance law of the District of Columbia, accompanied by their parents, adult petitioners, presented themselves to respondent Eleanor P. McAuliffe, the principal of Sousa Junior High School, for enrollment and instruction therein. The adult petitioners are taxpayers and citizens of the District of Columbia, and are required by law to send their respective children, minor petitioners, to the specific public schools designated by the respondents, and are subject to criminal prosecution for failure so to do. Act of February 4, 1925, 43 Stat. 806, 807, Ch. 140, Art. I, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs 201, 207). Each minor petitioner was denied and ex-

BLEED THROUGH

BLURRED COPY

cluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 27th day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Lawson J. Cantrell, Associate Superintendent of Schools in charge of the vocational and junior high schools in the District of Columbia, Divisions 1-9 (now Division 1), restricted to white pupils. Again each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 31st day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Norman J. Nelson, First Assistant Superintendent of Schools, Divisions 1-9, restricted to white pupils, and to respondent Hobart M. Corning, Superintendent of all the public schools in the District of Columbia, and each denied and excluded each minor petitioner from enrollment and instruction at Sousa Junior High School solely because of race or color.

On the 1st day of November, 1950, the respondent Board of Education of the District of Columbia upheld the actions of the other respondents and itself denied and excluded minor petitioners from enrollment and instruction at Sousa Junior High School solely because of their race or color.

Having exhausted their administrative remedies, thereafter and on November 9, 1950, petitioners, on their own behalf and on behalf of others similarly situated, filed a complaint (R. p. 1) and brought a class suit in the United States District Court for the District of Columbia, against the respondents, members of the School Board and officials of the public school system of the District of Columbia, in their respective official capacities. The action sought a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the respondents are without right in construing the statutes having to do with public education in the District of Columbia so as to re-

quire said respondents to exclude the minor petitioners from attendance at the Sousa Junior High School and in denying to the minor petitioners the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, by Title 8, United States Code, Sections 41 and 43, and by Article I, Section 9, Clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder, and by the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56, and further stating that the said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

The action further sought an interlocutory and a permanent injunction restraining respondents, and each of them, their successors in office, and their agents, and employees from precluding the admission of minor petitioners and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race or color, upon the grounds that said refusal of admission as applied to minor petitioners or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

The action also sought an interlocutory and a permanent injunction requiring respondents, and each of them, their successors in office, and their agents and employees to ad-

BLEED THROUGH

BLURRED COPY

mit the minor petitioners to attendance in the Sousa Junior High School in conformity with their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

Subsequently, the respondents, through their attorneys, filed a motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted (R. p. 18). The Honorable Walter M. Bastian, Judge in the United States District Court for the District of Columbia, refused either to grant an injunction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, or to issue a declaratory judgment that said denial was in violation of petitioners' rights under the Constitution and laws of the United States, or to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School free of any racial distinctions, and on April 9, 1951, granted the motion to dismiss (R. p. 19). The District Judge at the close of oral argument stated that he was bound by the holding of the United States Court of Appeals for the District of Columbia Circuit in *Carr, et al.* v. *Corning*, 86 App. D. C. 173, 182 F. (2d) 14 (1950), and *Browne, et al.* v. *Magdeburger, et al.*, 86 App. D. C. 173, 182 F. (2d) 14 (1950).

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. p. 20), and briefs were filed therein. This case has not been set down for oral argument, nor has it been submitted for judgment on the briefs, and no orders with respect thereto have been entered by that Court.

ERRORS RELIED UPON

The District Court erred:

1. In refusing to enter a declaratory judgment holding that the respondents are without right in excluding minor petitioners from Sousa Junior High School under color of law upon the ground that these actions violate rights secured by the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and by Title 8, United States Code, Sections 41 and 43, and by the Charter of the United Nations, Chapter I, Article I, Section 3, and Article IX, Sections 55 and 56; and in refusing to hold that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

2. In refusing to restrain respondents from denying admission of minor petitioners to Sousa Junior High School for no other reason than because of their race or color, upon the ground that this action is in violation of their rights secured under the due process clause of the Fifth Amendment, and Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

3. In refusing to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School in conformity with their rights under the Constitution and laws of the United States, and in refusing to hold that Acts of Congress do not compel racial segregation in the public schools of the District of Columbia, for they would then violate Article I, Section 9, Clause 3 of the Constitution of the United States, and respondents were in error in applying and construing said statutes so as to require the exclusion of minor petitioners from Sousa Junior High School solely on the basis of race or color.

BLEED THROUGH

BLURRED COPY

4. In granting respondents' motion to dismiss petitioner's complaint on the ground that it failed to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT

1. The Fifth Amendment of the Constitution of the United States precludes the Federal Government from imposing distinctions or restrictions based on race or color alone in affording educational opportunities to pupils in the District of Columbia. Therefore, respondents, as school officials in the District of Columbia, have no constitutional power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color.

2. (a) The Acts of Congress which provide educational opportunities for pupils in the District of Columbia do not compel their segregation solely on the basis of race or color.

(b) If these Acts of Congress are interpreted as compelling segregation in the public schools of the District of Columbia of minor petitioners solely on the basis of race or color then these Acts of Congress are bills of attainder, prohibited by Article I, Section 9, Clause 3 of the Constitution of the United States as well as violative of the due process clause of the Fifth Amendment.

(c) If these Acts of Congress are interpreted as not compelling segregation but as permitting segregation in the public schools of the District of Columbia of minor petitioners solely on the basis of race or color, then to the extent that these Acts are implemented by the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, this action of respondents implementing this legislation is unconstitutional.

3. The denial of admission of minor petitioners to Sousa Junior High School solely on the basis of race or color deprives them of their civil rights in violation of Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, in violation of

the Charter of the United Nations, Chapter I, Article I, Section 3, and Chapter IX, Articles 55, 56.

4. The court below erred in not granting petitioners the relief prayed for and in granting respondents' motion to dismiss minor petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

ARGUMENT

I.

THE ACTION OF RESPONDENTS IN EXCLUDING MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR AND IN REFUSING TO PERMIT ADULT PETITIONERS TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR DEPRIVES PETITIONERS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

A. Respondents' Actions in Regulating and Administering the Educational System of the District of Columbia Pursuant to and Under Color of Congressional Authority Are Limited by the Provisions of the Due Process Clause of the Fifth Amendment.

Article I, Section 8, Clause 17, of the Constitution of the United States grants to Congress the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. Pursuant to this power, Congress by legislation has provided a system of education for the District of Columbia and acting pursuant to and under color of this legislation respondents regulate and administer said system of education. Congressional legislation providing

BLEED THROUGH

BLURRED COPY

the system of education and the acts of respondents in regulating and administering the educational system of the District of Columbia, beyond question, are subject to the limitations of the due process clause of the Fifth Amendment. In *Capital Traction Company* v. *Hof*, 174 U. S. 1, 5 (1899) this Court observed:

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within the State; . . . so long as it does not contravene any provision of the Constitution of the United States."

In *Callen* v. *Wilson*, 127 U. S. 540, 550 (1888), this Court observed:

> ". . . There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property . . ."

One of the constitutional guarantees, which petitioners may not lawfully be deprived of the benefit of, is that as citizens no distinctions be made between them and other citizens because of race or color alone.

This Court, in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, (1943) said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . ."

In that same case, in a concurring opinion where this Court upheld the deprivation of the liberty of 70,000 Japa-

nese under a war-time curfew law, Mr. Justice Murphy said at page 111:

> ". . . The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.
>
> "Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments . . ."

Another constitutional guarantee, which minor petitioners may not lawfully be deprived of, is the right to go to Sousa Junior High School without any limitations based solely upon race or color.

Mr. Justice Murphy, in a concurring opinion in *Ex Parte Endo*, 323 U. S. 283, 308 (1944), said:

> ". . . For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction."

In the instant case minor petitioners would have a right to go to Sousa Junior High School but for respondents' action in excluding them solely because of their race or color, an action forbidden by the due process clause of the Fifth Amendment.

Final determination of what constitutes due process of law is for the judiciary, not Congress. *Baltimore & Ohio R. R. Co.* v. *U. S.*, 298 U. S. 349 (1938).

BLEED THROUGH

BLURRED COPY

B. The Educational Rights Which Petitioners Assert Are Fundamental Rights Protected by the Due Process Clause of the Fifth Amendment from Unreasonable or Arbitrary Restrictions.

Minor petitioners assert *rights to enjoy the educational opportunities* provided in the District of Columbia unrestricted by reason of their race or color and adult petitioners assert rights to enroll their children in public schools in the District of Columbia, unrestricted by reason of race or color. These educational rights are fundamental rights protected by the Fifth Amendment against unreasonable or arbitrary restrictions.

This Court held in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400 (1923), that:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men. . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision of the courts." (Emphasis supplied)

Again in *Meyer* v. *Nebraska*, *supra*, at page 400, this Court stated:

> "The American people have always regarded education and the acquisition of knowledge as matters of

> supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station of life; and nearly all the states, . . . enforce this obligation by compulsory laws."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-5 (1925), this Court held:

> "Under the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State: those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

Meyer v. *Nebraska* and *Pierce* v. *Society of Sisters* involved the protection given to educational rights by the Fourteenth Amendment against unreasonable or arbitrary State restrictions. It is clear, however, that these rights are similarly protected by the Fifth Amendment from unreasonable or arbitrary Federal restrictions.

In *Farrington* v. *Tokushige*, 273 U. S. 284, 298, 299 (1927), this Court said:

> "Enforcement of the Act probably would destroy most, if not all, of them; and certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution pro-

BLEED THROUGH

BLURRED COPY

tects him as well as those who speak another tongue.

"The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents, and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, . . . Bartels v. Iowa, . . . Pierce v. Society of Sisters . . . While that amendment declares that no State shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the Fifth Amendment—'no person shall . . . be deprived of his life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress . . . Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Courts have indicated a respect for opinion of legal scholars and teachers. See: *Georgetown College* v. *Hughes*, 130 F. (2d) 810 (1942). With this in mind, petitioners call attention of the Court to the brief of the Committee of law professors, at pages 36-38, filed as Brief, Amicus Curiae in the Supreme Court of the United States, *Sweatt* v. *Painter, et al.*, No. 44, October Term, 1949, from which we quote in part:

"(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation. While there are many instruments of transmission of culture—the family, the church, business institutions, political and social groups and the schools—in our society the school seems to have emerged as the most important . . .

"(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer

lies not, however, in simply indoctrinating them with the principle of racial equality. . . . 'Education in America must be education for democracy. If education is life and growth, then it must be life within a social group. . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience.'

"(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed, so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life. In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent."

C. The Official Action of Respondents Excluding Minor Petitioners from Admission to Sousa Junior High School Solely Because of Race or Color Is Immediately Suspect and Must Be Tested by Standards Laid Down by This Court to Determine Whether Petitioners' Rights Protected by the Fifth Amendment Have Been Violated.

Segregation of the races by government fiat is incompatible with our national policy. In *Hurd* v. *Hodge*, 334 U. S. 24 (1948), not only did the Court reaffirm this national policy limiting government enforced racial distinctions, but this Court declared that it would correct any

BLEED THROUGH

BLURRED COPY

courts in the District of Columbia, pursuant to its supervisory power over them, which took any action contrary to this national policy. *Consequently in the light of the Fifth Amendment cases herein cited and in view of the national public policy limiting government enforced distinctions based solely on race or color, this Court has placed upon the government the burden of justifying racial distinctions imposed upon its citizens.* As this Court said, speaking through Mr. Justice Black in the *Korematsu* v. *U. S.*, 323 U. S. 214, 216 (1944)—

> *"It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. *Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."* (Emphasis supplied.)

In the Japanese cases this Court has evolved certain definite standards by which government enforced racial distinctions among its citizens must be tested.

1. *The restrictions must be justified by an affirmative showing of peculiar circumstances, present emergency, or pressing public necessity.*

(a) In *Meyer* v. *Nebraska, supra,* this Court invalidated a Nebraska statute restricting the teaching of foreign languages, as infringing educational rights protected by the due process clause of the Fourteenth Amendment. At page 402 the Court said:

> "The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

(b) In *Farrington* v. *Tokushige, supra,* this Court invalidated an Act of the Legislature of Hawaii restricting the operation of foreign language schools, as infringing

educational rights protected by the due process clause of the Fifth Amendment. At page 298, this Court said:

> "Apparently all are parts of a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason."

In *Hirabayashi* v. *U. S., supra,* this Court upheld a military order confining Japanese-Americans to their homes at night as not infringing on the liberty of persons protected by the due process clause of the Fifth Amendment. At page 101, this Court said:

> "Our investigation here does not go beyond the inquiry whether, in the light of all relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."

Again at page 108, Mr. Justice Douglas concurring said:

> "Detention for a reasonable cause is one thing. Detention on account of ancestry is another."

(d) In *Korematsu* v. *U. S., supra,* this Court upheld a military order excluding Japanese-Americans from a military area as not infringing on the liberty protected by the due process clause of the Fifth Amendment.

Again at page 218, this Court said:

> "True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 P. M. to 6 A. M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."

In the instant case, no reason is given in justification of the restriction on the educational rights of petitioners. The only apparent reason is the race or color of petitioners, a reason sternly interdicted by this Court.

BLEED THROUGH

BLURRED COPY

2. *The restrictions must be for a purpose which government has authority to effect.*

(a) In *Pierce* v. *Society of Sisters, supra,* this Court invalidated a state statute the purpose of which was to compel general attendance at public schools by normal children, between eight and sixteen." (page 531) In concluding that the State had no authority to effect this purpose, this Court said at page 535:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

In the instant case the apparent purpose of the action of respondents complained of, is, as to public education in the District of Columbia, to compel Negroes to attend only schools attended by Negroes and to accept instruction by Negro teachers only. It is submitted that the Federal Government has no authority to effect such a purpose.

3. *The restrictions must be clearly authorized and if implied authority is relied upon it must appear that the restriction is clearly and unmistakably indicated by the language used in granting the authority.*

(b) In *Ex Parte Endo, supra,* this Court invalidated the detention in a Relocation Center of a loyal Japanese-American because no authority to detain was expressly granted or necessarily implied. At page 297 this Court said:

> "We are of the view that Mitsye Endo should be given her liberty. In reaching that conclusion we do not reach the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it had no authority to subject citizens who are concededly loyal to its leave procedure."

At page 300, it is said:

> "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Again at page 300 this Court said:

> "Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed."

And at page 301, 302, this Court points out:

> "Neither the Act nor the orders use the language of detention. The purpose and objective of the Act and of these orders are plain. We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purpose of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."

In the instant case it is clear from what is said under Point II of this brief that the respondents have no express authority to exclude minor petitioners from Sousa Junior High School solely because of their race or color. No lan-

BLEED THROUGH

BLURRED COPY

guage of exclusion is found in any Congressional Acts relating to public education in the District of Columbia. It is to be assumed that these Acts were passed for educational purposes and objectives. *It is submitted that no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race or color and the exclusion of minor petitioners from Sousa Junior High School by respondents solely because of race or color.* On the contrary, there is abundant authority for the proposition that governmentally enforced racial segregation is in conflict with educational purposes and objectives in our democratic society.

4. *The restrictions must have a reasonable relation to an authorized purpose within the competency of the government to effect.*

In *Hirabayashi* v. *U. S., supra,* Mr. Justice Douglas said in his concurring opinion at page 106:

> "Where the orders under the present Act have some relation to 'protection against espionage and against sabotage' our task is at an end."

In *Korematsu* v. *U. S., supra,* this Court said at page 218:

> "But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."

In the instant case, the exclusion of minor petitioners from Sousa Junior High School solely because of race or color has no reasonable relation to any educational purpose suggested by respondents, for they have suggested no purpose. It is submitted that no purpose, within the competency of the government to effect can be advanced in this case.

D. Petitioners Sustain Injury as the Direct Result of the Action of Respondents in Excluding Minor Petitioners from Sousa Junior High School Solely Because of Race or Color.

The exclusion of minor petitioners from admission to Sousa Junior High School, solely because of race or color is a deprivation of *petioners' constitutional rights to acquire useful knowledge, to choose a particular public school, and to enjoy public educational opportunities without government enforced limitations or restrictions based solely on race or color.* That injury continues and is not removed or even lessened by reason of the fact that minor petitioners "do now attend a junior high school in said District", allocated by respondents for the instruction of Negro children. Beyond question the deprivation of a constitutional right is injurious per se. See *Cummings* v. *Missouri*, 4 Wall. 277 (1866), where this Court observed that "liberty" includes "freedom from outrage on feelings as well as restraints on the person."

All of the injury shown by petitioners under Point II of this brief, in reference to a Bill of Attainder supports the contentions here made. Any deprivation of a freedom of choice solely on the basis of race or color is violative of petitioners' civil rights and thus injurious. To be compelled to attend school because of the compulsory school law, D. C. Code 1951 Ed., Title 31, Secs. 201, 207, and then to be compelled to accept segregation on the basis of race or color and to have one's feelings outraged is injurious per se. The deprivation of a civil right is an injury. *Giles* v. *Harris*, 189 U. S. 475, 485 (1903).

BLEED THROUGH

BLURRED COPY

II.

THE ACTS OF CONGRESS WHICH PROVIDE EDUCATIONAL OPPORTUNITIES FOR PUPILS IN THE DISTRICT OF COLUMBIA DO NOT COMPEL THEIR SEGREGATION SOLELY ON THE BASIS OF RACE OR COLOR.

A. The Language of the Acts of Congress Which Provide Educational Opportunities for Pupils in the District of Columbia Does Not Compel Segregation of Negroes from Whites.

These Acts are:

(a) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R.S.D.C. Section 281), which provides:

> Education of colored children. "It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia."

(b) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R.S.D.C. Section 282), which provides:

> Placement of children in schools. "Any white resident shall be privileged to place his or her child or

ward at any one of the schools provided for the education of white children in the District of Columbia he or she may think proper to select, with the consent of the Board of Education; and any colored resident shall have the same rights with respect to colored schools."

(c) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R.S.D.C. Sction 283), which provides:

Board of Education may accept and apply donations for colored schools—Accounting. "The Board of Education is authorized to receive any donations or contributions that may be made for the benefit of the schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the Board of Education to account for all funds so received."

(d) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1940, Sections 31-1112, was R.S.D.C. Section 306), which provides:

"Proportionate amount of school moneys to be set apart for colored schools. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education in the District of Columbia, such a proportionate part of all moneys received or expended for school or educational purposes, including the cost of sites, buildings, improvements, furniture and books, and all other expenditures on account of schools, as the colored children between the ages of 6 and 17 years bear to the whole number of children, white and colored, between the same ages, for the purpose of establishing and sustaining public schools for the education of colored children; and such proportion shall be ascertained by the

BLEED THROUGH

BLURRED COPY

last reported census of the population made prior to such apportionment, and shall be regulated at all times thereby."

(e) Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of June 4, 1924, 43 Stat. 370, Chapter 250, Section 3 (now District of Columbia Code, 1951 Ed., Title 31, Section 115), which provides:

> Principals of schools—Duties. "Principals of normal, high and manual training schools shall each have entire control of his school, both executive and educational, subject only in authority to the superintendent of schools for the white schools and to the colored first assistant superintendent for the colored schools, to whom in each case he shall be directly responsible."

(f) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R.S.D.C. Section 310), which provides:

> Facilities for educating colored children to be provided. "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools in the District of Columbia, as, in its opinion, will best accommodate the colored children in the District of Columbia."

(g) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, Title 31, Sections 669-670, 671, which provides:

> Number of First Assistant Superintendents—Sphere of supervision—Duties. "There shall be two First Assistant Superintendents of Schools, one white First Assistant Superintendent for the white schools, who, under the direction of the Superintendent of Schools, shall have general supervision over the white schools; and one colored First Assistant Superintendent for the

colored schools, who, under the direction of the Superintendent of Schools, shall have sole charge of all employees, classes and schools in which colored children are taught. The First Assistant Superintendents shall perform such other duties as may be prescribed by the Superintendent of Schools."

Boards of examiners—Composition—Designation of members. "Boards of examiners for carrying out the provisions of the statutes with reference to examinations of teachers, shall consist of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the white schools for the white schools and of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the colored schools for the colored schools. The designations of members of the supervisory or teaching staff for membership on these boards shall be made annually by the Board of Education on the recommendation of the Superintendent of Schools."

Appointment of chief examiners—Compensation. "There shall be appointed by the Board of Education, on the recommendation of the Superintendent of Schools, a chief examiner for the Board of Examiners for white schools. An Associate Superintendent in the colored schools shall be designated by the Superintendent of Schools as chief examiner for the board of examiners for the colored schools. All members of the respective boards of examiners shall serve without additional compensation."

It is quite clear from an examination of the above Acts of Congress that they possess no language of a mandatory character. The language is capable of an interpretation that it is a recognition by the Congress of the fact that separate private schools existed in the District long before public schools were supported by Congress. Only precise and concrete language requiring segregation of the races could overcome the historical fact that this language was approved by the Congress that opposed every type of racial distinction by Government.

BLEED THROUGH

BLURRED COPY

The history as well as the language of these various acts demonstrates an intention by the legislature at least to guarantee minimum opportunities to the colored children at a time when serious objections were made to any public education for them. Certainly there were those members of Congress who probably believed that for the newly freed Negro public education might best be secured by continuing separate schools for an adjustment period. All that this means is that the legislature sought to give the school officials a discretionary power. It seems doubtful that this Court today would conclude that such a delegation of power by Congress would be constitutional even if such an intent be found to exist. As Judge Edgerton, dissenting, said in *Carr* v. *Corning, supra,* at page 192:

> "When the Fifth Amendment was adopted, Negroes in the District of Columbia were slaves, not entitled to unsegregated schooling or to any schooling. Congress may have been right in thinking Negroes were not entitled to unsegregated schooling when the Fourteenth Amendment was adopted. But the question what schooling was good enough to meet their constitutional rights 160 or 80 years ago is different from the question what schooling meets their rights now."

Respondents can point to no law in the District of Columbia which would be violated by the admission of these minor petitioners to the Sousa Junior High School. In Ex Parte Endo, *supra,* this Court said at page 299-300:

> "We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an Order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation

> which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

There can be no doubt that if Congress had intended such a result as compulsory segregation of the races in education it would have said so in plain and unmistakable language.

An inspection of the constitutions and laws [1] of the states where segregation by law is in vogue should serve to illuminate the proposition that where the law making body intended a compulsory segregated educational pattern it expressly and clearly said so. As early as 1875 the Constitution of Alabama contained the following phrase: "But separate schools shall be provided for the children of the citizens of African descent." Alabama Const. 1875, Article XII, Section 1. It now provides, in its Constitution of 1901, that "no child of either race shall be permitted to attend a school of the other race." Alabama Const. 1901, Article XIV, Section 256. In Arkansas a statute charges the school directors in each district with the duty to establish separate schools for white and colored persons. Acts 1931, No. 169, Sec. 97, P. 476; Popes Dig. Sec. 11535. Delaware provides, "and separate schools for white and colored children shall be maintained." Delaware Const. 1897, Article X, Section 2. The Florida Constitution of 1885 commands that "white and colored children shall not be taught in the same school." Florida Const. 1885, Art. XII, Sec. 12. As early as 1877 the Constitution of Georgia read, "but separate

[1] For appropriate text of Statutes and Constitutions referred to herein, see Appendix A.

BLEED THROUGH

BLURRED COPY

schools shall be provided for white and colored races." Georgia Const. 1877, Art. VIII, Sec. I. There has to date been no change in this requirement. Kentucky's Constitution of 1890 says, "separate schools for white and colored children shall be maintained." Ky. Const. 1890, Sec. 187. That is the law of Kentucky today. Louisiana's Constitution of 1898 provides for "free public schools for the white and colored races separately established." La. Const. 1898, Art. 245. That "separate public schools shall be maintained for the education of white and colored children" is still the dictate of its present Constitution. La. Const. 1921, Art. 12, Sec. 1. The Mississippi Constitution of 1890 declares that "separate schools shall be maintained for children of the white and colored races." Miss. Const. 1890, Sec. 207. "Separate free public schools shall be established for the education of children of African descent." Mo. Const. 1875, Art. XI, Sec. 3. The Missouri Const. now provides "Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law." Mo. Const. 1945, Laws, 1945 P. 50. North Carolina —"And the children of the white race and the children of the colored race shall be taught in separate public schools." N. C. Const. 1876, Art. IX, Sec. 2. Oklahoma provides: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained." (Const. 1907, as amended Stat. 1931, 13676.) Constitution, Art. XIII, Sec. 3. The statutes of Oklahoma further provide: "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, P. 536, Art. 5, Sec. 1.) Statutes, Supplement 1949, Art. 5, Title 70, Sec. 5-1.

The 1895 Constitution of South Carolina states, "separate schools shall be provided for children of the white and colored races and no child shall ever be permitted to at-

tend a school provided for children of the other race." S. C. Const. 1895, Art. XIM Sec. 7. Tennessee's Constitution of 1870 provides "No school . . . shall allow white and Negro children to be received as scholars together in the same school." Tenn. Const. 1870, Art. XI, Sec. 12. Texas' Constitution of 1876 puts it thusly—"Separate schools shall be provided for white and colored children." Texas Const. 1876, Art. VII, Sec. 7. Virginia's 1902 Constitution says, "white and colored children shall not be taught in the same school." Va. Const. 1902, Art. IX, Sec. 140. Similarly, West Virginia, as long ago as 1872, wrote into its Constitution that—"White and colored persons shall not be taught in the same school." W. Va. Const. 1872, Art. XIII, Sec. 8. The only exception to this use of mandatory language in the laws of the group of states where segregation is institutionalized is Maryland. In Maryland the language of the statutes is similar to the language used in the Acts of Congress, *supra*. Maryland laws provide: (a) "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State . . ." An. Code Md. 1939, Art. 77, Sec. 111. (b) "it shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths between six and twenty-one years of age . . ." An. Code Md. 1939, Art. 77, Sec. 192. In other sections (193, 194, 195), provisions are made for administering "colored schools." Section 203 provides for colored industrial schools; Section 252, for a colored teacher normal school. The compelling language used by the other southern states is absent. We request this Court to take judicial notice of the fact that under these statutes the Board of School Commissions by a vote of 5 to 3 authorized the admission of a Negro student this term to the white Polytechnic Institute of Baltimore, Maryland, without a law suit or legislative action. Admittedly, they did this because no similar provisions were available for Negroes, but likewise

BLEED THROUGH

BLURRED COPY

it is clear that they did not consider these Maryland laws any bar to their administrative action.

Thus, it appears that in the only one of these states where the laws are similar to those in the District of Columbia their language is not interpreted by school officials as compelling segregation.

Speaking of the separate schools of the District of Columbia in a speech in support of a Civil Rights Bill which became the Civil Rights Act of 1875, Senator Pratt of Indiana observed that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[2] There was, therefore, at least some congressional opinion among the contemporary legislators who were active in efforts of Congress to provide equality for the Negro during the period when some of these Acts of Congress were first being considered, that they did not compel segregation.

B. An Interpretation by This Court That These Acts of Congress Compel the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color Alone Would Render Them Unconstitutional for They Would Then Be Met with the Prohibitions of Article I, Section 9, Clause 3, of the Constitution of the United States, and the Limitations Set by the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

1. *Such an interpretation would make these Acts violative of the due process clause of the Fifth Amendment.*

That these Acts, if they are interpreted to compel segregation of pupils in the District of Columbia solely on the basis of race or color, would be unconstitutional under the

[2] From speech of Senator Pratt, 2 Cong. Rec. 3452, 43 Cong., 1st Sess. (1874) at 4081, 4082.

due process clause of the Fifth Amendment has already been shown in Point I of this brief, *supra.*

The question which the instant case raises, whether the Federal Government in providing educational opportunities for pupils in the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color, has never been presented to this Court before. The United States Court of Appeals for the District of Columbia Circuit had this question presented to it in only one other case, *Carr* v. *Corning, supra,* and that court there decided that these Acts of Congress, *supra,* compelled segregation in the District of Columbia and that compulsory separation of races in public education was constitutional. The court below relied upon the holding in the *Carr* case in dismissing petitioners' complaint.

The United States Court of Appeals for the District of Columbia Circuit has had before it only three cases dealing with the question of race distinctions in the provisions for opportunities for public education in the District of Columbia. The first case was *Wall* v. *Oyster,* 36 App. D. C. 50 (1910). In that case, petitioner, a resident of the District of Columbia of school age, questioned her classification as a Negro for purposes of assignment to a particular school. The court, in deciding that question, stated that compulsory segregation of the races was constitutional in the District of Columbia. Petitioner having conceded that point, and having based her case upon a lack of standards for the determination of race, and upon a failure to provide a hearing upon this determination, the issue before the court was whether or not proper standards had been set and a proper hearing provided for. There was no issue before the court as to whether or not the government possessed the power to make the classification. Therefore, that decision is of little value in determining the question posed in the instant case and was not relied upon by the Court of Appeals in the *Carr* case for this purpose.

BLEED THROUGH

BLURRED COPY

The Court of Appeals for the District of Columbia Circuit first faced the question of the power of the Federal Government to segregate Negroes from whites in providing opportunities for public education in the District of Columbia in *Carr* v. *Corning,* and *Browne* v. *Magdeburger, supra.*

The court consolidated for argument and decision these two cases. The *Browne* complaint did not present the question of the constitutionality of the separation of the races in public education; however, the *Carr* complaint did. The Court of Appeals held, at page 175:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did."

The Court concluded on this point that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 did not mean to prohibit the legislature from providing separate schools. The Court examined the chronology of statutes relating to the separate school system in the District of Columbia and concluded that the framers of the Fourteenth Amendment intended to provide separate school facilities for the races in the District of Columbia.

Petitioners have already shown why they do not agree with the opinion of the court below that these Acts of Congress, *supra,* compel segregation. But, even if petitioners are wrong and, these Acts of Congress do compel segregation, these Acts are unconstitutional and the *Carr* case was wrongly decided. The majority failed to meet and deal with the fundamental question raised by Judge Edgerton's dissent. It is submitted that before any reliance can be placed upon the conclusion reached by the majority in

the *Carr* case the following argument of Judge Edgerton at page 192 must first be answered—

> "Appellees say that Congress requires them to maintain segregation. The President's Committee concluded that congressional legislation assumes the fact of segregation but nowhere makes it mandatory. I think the question irrelevant since legislation cannot affect appellant's constitutional rights."

The Court of Appeals was so preoccupied in the *Carr* case with the history and background of the Fourteenth Amendment, and with the legal theories underlying the separate but equal doctrine, and was so convinced by the record in which the lower court had found evidence showing equality of facilities, that its opinion that the action of the School Board was constitutional is of doubtful value in the instant case. Here the sole question is as to the constitutional power of the school officials to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. Here there is no question of equality of facilities. This view is supported by the opinion of the Court of Appeals, especially where it is observed that Judge Clark concurred in the majority opinion although he considered the cases moot and to have been properly dismissed, since the factual basis for the actions was the double shift at Browne Junior High School at the time the actions were brought, and since the double shift had been eliminated prior to the action.

Therefore, whichever interpretation is placed upon these Acts of Congress, respondents are still limited in their power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color by the Constitution and laws of the United States, which limitations should be determined by this Court.

2. *Such an interpretation would render these Acts Bills of Attainder.*

Article I, Section 9, Clause 3 of the Constitution of the

BLEED THROUGH

BLURRED COPY

United States provides that—"No Bill of Attainder or ex post facto law shall be passed.[3]

The Board of Education of the District of Columbia took the position, which was confirmed in the *Carr* case, *supra*, and was relied upon by the Court in the case below, that the statutes enacted by Congress governing public schools in the District of Columbia compelled it to segregate Negroes from whites in the school system.

It is clear that, if respondents and the Court of Appeals in the *Carr* case are right in their interpretation then these statutes are Bills of Attainder, for they compel the exclusion of minor petitioners from Sousa Junior High School solely on account of their race or color, and they are in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States, for:

a. They are legislative or congressional statutes.
b. They are directed at named or easily ascertainable persons—namely, Negroes.
c. They inflict punishment on these persons. This punishment is arbitrary.
d. They inflict punishment without a judicial trial.
e. They convict Negroes of the "crime" of being inferior by reason of birth, color and blood, or of being descendants of slaves.

[1] *These Are Acts of Congress and These Petitioners Are Easily Ascertainable Members of a Group*

It is obvious that these are Acts of Congress, and *United States* v. *Lovett*, 328 U. S. 303, 315-316 (1946), held "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder pro-

[3] For historical background of bills of attainder in America and in England see Notes, 46 Col. L. Rev. 849, Notes, 21 Tulane L. Rev. 278, 2 Story, Commentaries on the Constitution of the United States (5th Ed. 1891) 216, Adams, Constitutional History of England (1935) 228, Holdsworth, History of English Law (4th Ed. 1927) 381.

hibited by the Constitution." Negro children certainly constitute an easily ascertainable group, especially since, under the rule of *Wall* v. *Oyster, supra*, the Board is empowered to determine race for itself, and may force pupils and their parents to accept that determination. Just as in the *Lovett* case, *supra*, the present case involves punishment without judicial trial, and determined by no previous law or fixed rule. A judicial trial would at least provide safeguards against arbitrary action which is inherent—if not implicit—in an administrative condemnation such as the Board of Education's segregation rule. *United States* v. *Lovett, supra*. According to this Court in *Oyama* v. *California*, 332 U. S. 633, 646 (1948), only exceptional circumstances can excuse racial discrimination by law, and such distinctions must be justified by the agency practicing the discrimination. This has never been done with respect to segregation in the public schools of the District of Columbia.

There can be no doubt that segregation in our public schools is aimed at Negroes. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 452-453 (1873).

In *Cummings* v. *Missouri, supra*, at page 327, the Supreme Court declared: "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms define any crimes or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared." This passage surely fits the position in which appellants are placed by appellees. What legislatures may not accomplish directly, they may not effect by indirection. *Ex Parte Garland*, 4 Wall. 333, 380 (1866); *United States* v. *Lovett, supra*. Neither may they act so as to secure by implication that which would be invalid if expressly provided. *Oyama* v. *California, supra*.

It is the function of the courts to protect citizens against

BLEED THROUGH

BLURRED COPY

discriminatory acts such as those presented in this case. Where else can one turn in the face of the disgrace and ignominy heaped upon petitioners by respondents? To paraphrase this Court in *United States* v. *Lovett, supra,* what is involved here is a proscription by the Board of Education of more that 50,000 Negro children, prohibiting their ever attending a school simultaneously occupied by white children. Were this case held not to be justiciable, Board action, aimed at a large, readily recognizable class, which stigmatized their ancestry and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result.

[2] *These Acts of Congress Inflict Punishment on Petitioners*

a. *Segregation is Punishment*

That segregation constitutes punishment is the conclusion reached by recognized authorities in the field of sociology, politics, psychology and law, from a consideration of the studies of segregation and its effects.

Gunnar Myrdal, who made a detailed and authoritative study of the entire problem posed by treatment of the Negro minority in the United States, pointed out that what was merely segregation forty years ago is becoming a caste system today. He continued: "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups." (1 Mydral, *An American Dilemma,* 645 (1944).

The process of development from segregation to caste system is described in Mac Iver, *The More Perfect Union,* 67-68 (1948)—

> "Now let us consider more clearly the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has

greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group but to a considerable extent, in the lower group as well. A total *upper caste complex*, congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."

The effects of segregation upon the group segregated have recently been summarized in a note in 56 Yale L.J. 1059, 1061-2 (1947):

"Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result, in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."

BLEED THROUGH

BLURRED COPY

On the other side of the picture, "Jim Crow" laws, which govern important segments of everyday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside those laws and give it respectability and institutional fixity. (Myrdal, *An American Dilemma*, pp. 579-580). See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. Rev. 201, 204-205. As the Supreme Court in California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension." (*Perez* v. *Lippold*, 32 Calif. (2d) 711, 725, 198 P. (2d) 17, 25 (1948).) In fields which "Jim Crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid." (1 Myrdal, *An American Dilemma*, p. 635).

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segregated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent (Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 259, 261, 262 (1948)). Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided; 2.3% expressed the opposite opinion, and 7.4% did not answer the question or expressed no opinion (Id., 261, 266). Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression (Id., 272, 277).

The resentment and hostility provoked by segregation

find various means of psychological "accommodation," various forms of release (Prudhomme, *The Problem of Suicide in the American Negro,* 25 Psychoanalytic Review, 187, 200). Mediocrity is accepted as a standard because of the absence of adequate social rewards or acceptance (Dollard, (*Caste and Color in a Southern Town,* 424 (1937)). (McLean, *Group Tension,* 2 Journal of American Medical Women's Association, 479, 482). Energy and emotion which might be constructively used are lost in the process of adjustment to the "Jim Crow" concept of the Negro's characteristics and his inferior status in society (Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual and to His Relationship with Other People?,* 29 Mental Hygiene, 189, 190, 191 (1945)). Psychosomatic disease is induced by the tensions engendered by segregation and other forms of racial discrimination. (McLean, *Psychodynamic Factors in Racial Relations,* 244 The Annals of the American Academy of Political and Social Science (March, 1946), 159, 161).

It is further submitted that any suggestion that no punishment is inflicted ignores the basic realities of the situation. The whole theory upon which a segregated school system is maintained is that the dominant class regards the subject group so far inferior as to require quarantining the latter during school hours, to avoid contamination or pollution of the children of the dominant group. Realization of this motive, when it first comes to a child of the segregated class, cannot help but cause mental anquish (i.e., constitutes injury) and repeated reminders of the implications of segregation keep one's awareness of the badge of inferiority fresh during the remainder of one's life.

According to the Brief *Amicus Curiae* of the Committee of Law Teachers against Segregation in Legal Education

[*] For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, An American Dilemma, vol. II, pp. 757, 767.

BLEED THROUGH

BLURRED COPY

before the Supreme Court of the United States in *Sweatt* v. *Painter, supra,* at p. 33, "The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society."

In addition to the conclusions by the experts in the field that segregation is punishment, this Court has characterized similar results of State and Federal statutes as punishment. The rights protected by due process of law included life, liberty and property. Any statute directed at a named individual or an easily recognizable class, which seeks to punish by deprivation or suspension of any of these rights without a judicial trial is a bill of attainder. *Cummings* v. *Missouri, supra.* This Court, in the *Cummings* case, said at pages 321-322: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the proctection of these rights all are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined." The acquisition of knowledge is one of the protected rights. *Meyer* v. *Nebraska, supra. The permanent prohibition against attendance in non-segregated schools is as much punishment as one which perpetually restrains one from serving the Government. United States* v. *Lovett, supra.*

Any contention that no injury is inflicted should be considered not only from the point of view of the contentions advanced in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and in *Henderson* v. *United States,* 339 U. S. 816 (1950), but in the light of *Oyama* v. *California, supra,* at page 646—

> "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land . . ."

Adult petitioners are certainly subject to punishment if they attempt to enforce the right of their children to sit in school with white children, either by withholding [4] their children from attendance at a segregated colored school, or by an attempt to place them at a segregated white school. *Petitioners and all other persons who are under the interdiction of the statutes as interpreted by the Board* [5] *are attained by reason of their birth, blood and pigmentation, and there is no way in which they can overcome the obstacles placed in their way by respondents.*

b. *This Punishment is Arbitrarily Imposed*

We submit that it may properly be held that punishment is arbitrarily imposed where an act forbidden bears no relation to the object allegedly sought to be achieved. And it is certainly true in this case that discriminating against minor petitioners because of their birth, color and blood and the previous servitude of their grandparents or great-grandparents bears no relation whatsoever to their educability in a public school together with white children.

---

[4] For full text of compulsory attendance statute see Appendix B, D. C. Code 1951 Ed., Title 31, Sec. 201, 207.

[5] "Without any doubt there is also in the white man's concept of Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. The ordinary man means something particular but beyond secular and rational understanding when he refers to 'blood'. The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up." 1 Mydral, 100.

BLEED THROUGH

BLURRED COPY

This argument is supported by the following quotation in Petition and Brief in Support of Petition for Writ of Certiorari in the Supreme Court of the United States in *Sweatt* v. *Painter, supra*:

> "Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified, as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color."

In regard to the question of a relationship between the act punished and the objective of the punishment, the Supreme Court had this to say at pages 319-320 in *Cummings* v. *Missouri, supra*:

> ". . . There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment of draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church, nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the mere statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath

could not, therefore, have been required as a means of ascertaining whether the parties were qualified or *not* for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

"The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him any thing less that these is no punishment at all.' The *learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraint on the person.* He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." (Italics supplied.)

As we have already stated, in the present case there is absolutely no relation between color and educability. Therefore, when the respondents maintain separate schools for colored and white children, they seek to insult and degrade the former, not to educate. And, since it is thus a

BLEED THROUGH

BLURRED COPY

crime to be colored, Negro children are being arbitrarily punished by being singled out and deprived of their rights and privileges—i.e., to be given the same education under the same conditions as any other child, whatever its color. Further, respondents clearly do not include in their definition of liberty freedom from outrage on the feelings, since they inflict such arbitrary punishment on more than half the children under their jurisdiction every day they operate. There is no requirement that there must have been a previous enjoyment of a right. A study of the entire passage shows clearly that the Court means by any right previously enjoyed, any right constitutionally possessed.

We have already adverted to the fact that the lack of any relationship between the methods used and the end sought to be attained is sufficient to constitute arbitrary imposition of punishment. Mr. Justice Murphy, in a concurring opinion in *Oyama* v. *California, supra,* observed that no rational basis for legislation existed where laws discriminating against citizens were motivated by racial hatred and intolerance.

And in *Skinner* v. *Oklahoma,* 316 U.S. 535, 541, 542 (1942), this Court used racial discrimination as a standard for striking down a State law providing for sterilization of certain offenders, in the following terms: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Having shown that minor petitioners have, in fact, suffered injury and punishment by reason of their segregation, and that the segregation on account of race or color may properly be regarded as wholly arbitrarily imposed punishment, we proceed to examine the other elements of a bill of attainder.

[3] *No Trial or Hearing Is Given Petitioners*

In a bill of attainder punishment is inflicted without a judicial trial, *Cummings* v. *Missouri, supra.* In the case at bar, nothing can be clearer than that, if the Board of Education is right in its contention that these Congressional Acts bar any Negro child, at any time, from attending a public school designated for use of white children, solely on the basis of race or color, these minor petitioners have been found guilty of being Negroes and convicted of the offense of possessing some inherent defects which render them unfit to attend Sousa Junior High School without a judicial trial. *There has never been a finding, either by the Board or by Congress, that all Negro children, or any particular individuals among them constituted any such menace to white pupils as would warrant isolating all Negroes in schools limited by law to their sole use.* No reason for segregation has ever been announced. And there has certainly been no attempt to try these individual minor petitioners to determine whether there is any valid ground for depriving them of their right to associate free of a limitation based on their race or color alone in school activities with white children of their own age.

[4] *These Petitioners Are Convicted on Past Acts of a Crime by These Acts of Congress*

In *Cummings* v. *State of Missouri, supra,* page 323, this Court defined a bill of attainder as "a Legislative act which inflicts punishment without a judicial trial." The opinion then continued: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The remainder of the opinion is, we think, particularly appropriate in the present case: "In these cases, the legislative body, in addition to its legitimate functions, exercises the powers and office

BLEED THROUGH

BLURRED COPY

of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Certainly the portion of the opinion just quoted fits the present situation. If the Board, in acting for the legislature is compelled by statute to segregate Negroes and whites, it is acting under legislation which has convicted Negroes of the crime of being inferior by birth, blood, and color and dooms them to separation, without declaring a previous condition of birth, blood or color to be a crime; the guilt attaches to any child the Board sees fit to classify as a Negro (*Wall* v. *Oyster, supra*), without any trial; without any proof that an individual Negro child is in fact so far inferior by birth, blood and color to white children that he may not associate with them in school, it requires that the Negro be taught in a separate schoolhouse; and it fixes the sentence to cover the entire time the child is subject to the jurisdiction of the Board and affects his entire life and deprives him of liberty, property, job opportunity and happiness.

It is manifestly clear that this Court should not interpret these Acts of Congress as compelling racial segregation which would render them unconstitutional when it is possible to interpret them as not requiring segregation and thus render them constitutional. We must assume that Congress enacted these statutes with a constitutional intent. See, *Schneiderman* v. *United States*, 320 U. S. 118, 157, 158 (1943). *This would necessarily mean that they do not compel segregation for if these statutes are interpreted as compelling segregation they would clearly fall within the ban of the constitutional provision against bills of attainder.*

C. If These Acts of Congress Are Interpreted as Permitting the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color, Then to the Extent That This Permissive Legislation Is Implemented by the Action of the Appellees in Denying Admission of Minor Petitioners to Sousa Junior High School, the Action of Respondents Is Unconstitutional.

The arguments submitted under points I and II of this brief are supportive of this proposition. Therefore, this Court should not interpret these Acts of Congress as even authorizing or permitting segregation since any implementation of such authority by respondents would lead to an unconstitutional result, namely, the denial of the admission of minor petitioners to Sousa Junior High School solely on the basis of race or color.

III.

THE DENIAL OF ADMISSION OF MINOR PETITIONERS TO SOUSA JUNIOR HIGH SCHOOL SOLELY ON THE BASIS OF RACE OR COLOR DEPRIVES THEM OF THEIR CIVIL RIGHTS IN VIOLATION OF ARTICLE VI, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES AND OF TITLE 8, UNITED STATES CODE, SECTIONS 41 AND 43, AND IN VIOLATION OF THE CHARTER OF THE UNITED NATIONS, CHAPTER I, ARTICLE I, SECTION 3, AND CHAPTER IX, ARTICLES 55, 56.

A. The Respondents' Refusal to Admit Minor Petitioners to Sousa Junior High School Solely Because of Race or Color Deprives Them of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43, Commonly Referred to as the Civil Rights Act.

It is apparent to petitioners that the racially segregated schools of the District of Columbia administered under control of respondents are operated in violation of the Civil

BLEED THROUGH

BLURRED COPY

Rights Act, Sections 41 and 43 of Title 8, U. S. Code, which provide:

> Section 41: Equal rights under the law:
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. Section 1977.
>
> Section 43. Civil action for deprivation of rights:
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979.

In *Hurd* v. *Hodge, supra*, this court, in prohibiting courts of the District of Columbia from enforcement of racial restrictive covenants said of Section 42 of Title 8 U. S. Code, a companion section of Section 41 which is relied upon here:

> All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt, that for the purposes of this section, the District of Columbia is included within the phrase 'Every state and Territory.' Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia . . ."

While it is true that petitioners do not rely upon Title 8, U. S. Code, Section 42, the section of the Civil Rights

Act considered in *Hurd* v. *Hodge, supra,* but upon Sections 41 and 43, it is hardly possible to conceive that the Supreme Court would make any differentiation in the applicability of these sections to the District of Columbia. The genesis of Sections 41 and 42 are the same. Both sections were originally contained in section 1, chapter 31 of the Civil Rights Act of 1866 (14 Stat. 27). Although now placed in different sections of Title 8, U. S. Code, both sections—41 and 42—secure the rights of persons and citizens in "every State and Territory." Hence, just as under the interpretation of Section 42 in *Hurd* v. *Hodge, supra,* the term "every State and Territory" must be said to include the District of Columbia, as regards Section 41. Any other construction would lack uniformity and would be unreasonable and historically illogical.

Section 43 of Title 8, U. S. Code, is derived from the Act of April 20, 1871, Chapter 22, 17 Stat. 13. As presently entitled under the Code, this section provides for a "civil action for deprivation of rights," obviously, therefore, if Section 41 of the Civil Rights Act is applicable to the District of Columbia, the section of the Civil Rights Act recognizing the means by which civil rights are vindicated by actions at law or suits in equity is equally applicable to violations of civil rights occurring in the District of Columbia. We conclude, therefore, that both Sections 41 and 43 are within the constitutional power of Congress to enact, and that these sections are operative in the District of Columbia.

The remaining question is whether government enforced racial segregation in the public schools of the District of Columbia is violative of the Civil Rights Act. Petitioners contend that racial segregation in the public schools as enforced by respondent under color of law, does violate these sections.

The Congress of the United States, acting pursuant to its powers in the District of Columbia, has provided for

BLEED THROUGH

BLURRED COPY

public education there. It has given to persons residing within the District the privilege of securing, at public expense, an elementary and high school education. This privilege, we contend, once given must be afforded to all without any racial distinction. The Civil Rights Act compels such a result.

The Civil Rights Act does not specifically mention public education. In fact, there is no specification of the particular rights protected, but rather a broad statement concerning "full and equal benefits of all laws" and enjoyment of "rights, privileges or immunities secured by the Constitution and laws." However, when we view the sections presumably directed against discriminatory governmental action in the light of the provisions of the Act of March 1, 1875, Chapter 114, 18 Stat. 335, concerning racial discrimination by individuals within the United States, *it becomes abundantly clear that the sections here under discussion were meant to cover all situations in which, through governmental action, persons are deprived of some right, privilege or immunity recognized under the Constitution and laws of the United States.* And these sections were enacted to insure that all citizens, white and black, should be vested with the same rights and the same responsibilities as citizens. Racial distinctions were thereby prohibited.

The cases support this analysis. In *United States* v. *Cruikshank*, 92 U. S. 542, 555 (1875), this observed:

> "No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, . . ."

And, in *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), the Supreme Court stated that:

> "The plain object of these (civil rights) statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Our national policy, as found in the Constitution, laws and treaties of the United States as well as in the applicable legal precedents, renders unlawful the actions of respondents in excluding minor petitioners from attendance at Sousa Junior High School solely because of race and color. In speaking of the Fourteenth Amendment and the Civil Rights Act of 1866, of which sections 41 and 43 are constituent parts, this court in *Hurd* v. *Hodge, supra,* at page 32, said:

> ". . . It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land . . ."

In a series of State cases this Court has made clear some prohibitions of the Fourteenth Amendment against government enforced distinctions based solely on race or color. In the case of *Strauder* v. *West Virginia,* 100 U. S 303, 306, 307 (1879), this Court condemned the systematic exclusion of colored persons from juries. Similarly the right to qualify as a voter in primary or general elections has been protected against denial because of race or color. *Smith* v. *Allwright,* 321 U. S. 649 (1944). This Court has held that the Constitution of the United States prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948); *Yick Wo* v.

BLEED THROUGH

BLURRED COPY

Hopkins, 118 U. S. 356 (1886). States may not enforce agreements excluding Negroes from owning or occupying property in white neighborhoods. *Shelly* v. *Kraemer*, 334 U. S. 1 (1948). Nor may railroads segregate Negro passengers in dining cars. *Henderson* v. *United States, supra.* Nor may state Universities, when they admit Negroes make any racial distinctions in affording them educational opportunities. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

These holdings are clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the school officials of the District of Columbia. Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that exclusion of minor petitioners from Sousa Junior High School solely because of race or color is prohibited by the Civil Rights Act. *That statute by its terms, requires that all persons shall have the same rights "as is enjoyed by white citizens . . . to the full and equal benefit of all laws."* That minor petitioners have been denied *that right* by virtue of the action of the respondents is clear. They have been denied admission to Sousa Junior High School solely by reason of race or color. It is no answer to petitioners to say that whites may also be denied admission to some Negro school because of race or color.

Speaking on this exact point in *Shelley* v. *Kraemer, supra,* at page 22, this court speaking through Chief Justice Vinson said:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

That these sections of the Civil Rights Act prohibit racial distinctions is too clear for argument. That these sections encompass the right or privilege of public education is free from any reasonable doubt, for at the very foundation of our democratic institutions, in the preservation of rights and the recognition of the duties of citizens, stands the

public school as the logical agency for giving the people the attitudes and skills requisite for effective participation in a democracy. We strongly urge this Court to recognize that the Civil Rights Act prohibits government enforced racial segregation in public education in the District of Columbia.

B. Respondents' Refusal to Admit Minor Petitioners to Sousa Junior High School Solely Because of Race Deprives Them of Fundamental Freedoms in Violation of Chapter I, Articles 1(3), 2(2), Chapter IX, Articles 55(c) and 56 of the Charter of the United Nations.

Articles 1(3), 2(2), 55(c) and 56 of the United Nations Charter, 59 Stat. 1035, *et seq., announce a policy against segregation and discrimination on the basis of race.* The United States is a member of the United Nations and one of the signatory powers to the United Nations Charter.

Chapter I, Article 1(3) declares:

> "One of the purposes of the Organization is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and . . ."

Chapter I, Article 2(2) engages that:

> "All members in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with the present charter."

Furthermore, Chapter IX, Article 55(c) avows:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination

BLEED THROUGH

BLURRED COPY

> of peoples, the United Nations shall promote . . . universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

And Chapter IX, Article 56 breathes meaning into this vow by requiring that:

> "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purpose set forth in Article 55."

The petitioners contend that these articles give to minor petitioners rights which the respondents have violated because: (1) the United Nations Charter is a treaty of the United States, (2) the Articles of the Charter here in issue are capable of judicial enforcement, and (3) properly constructed, they prohibit the segregation of races in free public education.

That the United Nations Charter is a treaty to which the United States is a signatory has not been seriously questioned. It was negotiated by the President, submitted by him to the Senate of the United States for ratification and was ratified by that body as a treaty of the United States. It is likewise the position of the petitioners that Articles 55 and 56—the provisions of the treaty before this Court—are capable of judicial interpretation and application without further legislative or executive action. As a treaty the Charter became "the supreme Law of the Land" and it thus becomes the duty of the courts, both state and federal, to give effect to its provisions. U. S. Constitution, Article 6, Clause 2.

The courts, however, in construing Article VI of the Constitution with reference to judicial enforcement of treaties, have divided treaties into two classes—self-executing and non-self-executing. Self-executing treaties are said to be those which are capable of judicial enforcement without

further legislative or executive action and executory or non-self-executing treaties are those which require further political action before judicial enforcement. In *Foster* v. Neilson, 2 Pet. 253, 314 (1829), this Court, speaking through Chief Justice Marshall, pointed to the two classes of treaties and purported to set forth the basis upon which the distinction between them is to be made.

> "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulations import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Casual examination of this quotation probably suggests that the distinction between the classes of treaties is to be determined by a finding whether the treaty is in form and substance a contract. Viewed in proper perspective, and with particular reference to *U. S.* v *Percheman,* 7 Pet. 51 (1833), it must be concluded that the distinction is not made on such basis but is in fact determined by the subject matter of the treaty. If the subject matter of the treaty before the court is such that it is only capable of interpretation and application by the legislative or executive branches of the federal government, the treaty is executory or non-self-executory. Conversely, if the subject matter of the treaty before the Court is of such a character that it can be interpreted and applied by the judiciary the treaty is self-executing. Under the provision of Article VI *all* treaties become the "Law" of the Land. The fact that a particular treaty contemplates or requires future action does not make it any less the Law of the Land, (*Bacardi Corp.* v. *Domanech,* 311 U. S. 150 (1940)), nor is it any less the Law of the Land if Congress may, within its

BLEED THROUGH

BLURRED COPY

competence, implement any such treaty if it so desires.

Consequently, the doctrine of non-self-executing treaties in American Constitutional Law is but an aspect of the doctrine of "political questions"—"separation of powers." In other words, the sole distinction between self-executing and non-self-executing treaties has been used in American Constitutional Law only with reference to the agency of the Federal Government competent to execute that treaty. All other factors are irrelevant.

The subject matter of Articles 55 and 56 relates to human rights and fundamental freedoms. Their provisions—and particularly Article 56—impose upon the agencies of the United States Government the duty of taking "separate action" to enforce these human rights and fundamental freedoms without racial distinction as the "law of the land." In determining the agencies of the United States Government capable of carrying into effect these articles, it cannot be said that the subject matter is within the exclusive area of the political branches of the government. For these reasons, it is the view of the petitioners that Articles 55 and 56 of the Charter are laws of the United States, do not require further legislative action, and are enforceable by the judiciary.

The petitioners find support for their position in the concurring opinions in *Oyama* v. *U. S., supra.* In the *Oyama* case, *supra,* the major holding of the Court was that a section of the California Alien Land Law was unconstitutional in that it was a denial of the equal protection of the law. The four concurring Justices were of the opinion that the whole statute was unconstitutional. In one of the concurring opinions, Mr. Justice Murphy, with whom Mr. Justice Rutledge joined, outlined the discriminatory aspects of the statute, examined the embarrassing history, and stated at page 673:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

"And so in origin, purpose, administration and effect the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations . . ."

The language leaves no doubt that they considered that the human rights provisions of the Charter prohibited segregation on the grounds of race or color, and, further, that the Charter is binding upon the courts of the United States. Mr. Justice Black and Mr. Justice Douglas concurred, and their opinion at pages 649-650, is also pertinent:

". . . we have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' (Citing Articles 55 and 56.) How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

In *Namba* v. *McCourt*, 185 Ore. 579, 204 P. (2d) 569 (1949), the court concluded that the United States had "become bound by Articles 55 and 56 of the United Nations Charter."

Moreover, it appears that in two instances, where lower courts were faced with the enforcement of other Articles of the Charter these courts have indicated that the Charter is a treaty having force and effect of law without legislative implementation. Thus, in *Balfour, Guthrie and Company* v. *United States*, 90 F. Supp. 831 (N.D. Cal. S.D. 1950),

BLEED THROUGH

BLURRED COPY

the Court held "That the United Nations Organization could sue the United States under the "Suits in Admiralty Act." In *Curran* v. *City of New York,* 191 Misc. 229, 77 N.Y.S. (2d) 206 (1947), aff'd 275 App. Div. 784, 88 N.Y.S. (2d) 924 (1949), the Court held "That Articles 104 and 105 of the Charter were the supreme law of the land, and that by operation of these Articles the organization had the capacity to own land and was immune from taxation." These cases, though not involving Articles 55 and 56, are offered as additional support for petitioners' position.

Articles 55 and 56 properly construed would prohibit government enforced racial segregation in the public schools of the District of Columbia. The Charter of the United Nations must be given a liberal construction in order to effectuate its objectives. The objective of Article 55 of the Charter is to secure to all persons within a particular society the basic freedoms and rights of that society. Basic in any democratic society is public education. The petitioners see no necessity to belabor this point, for whether public education be regarded as a right or a privilege, it has been recognized throughout the United States as a basic element of government and in our interpretation of Articles 55 and 56 it must be of necessity included within the terms "human rights and fundamental freedoms."

Even if, arguendo, the court should determine that the Charter of the United Nations must be implemented by further legislation to be specifically enforceable, *it is clear that the ratification of the Charter by the Senate of the United States and the signing of the Charter by its officially appointed representatives constitute a declaration of the Public Policy of the United States.* As the Honorable Manley O. Hudson stated in 44 *Amer. Journal of Int. Law,* 543 at 548, while contending that the Charter is not specifically enforceable: "The fact that the United States has obligated itself to cooperate may be taken into consideration in determining the national public policy . . ."

It is also a morally binding promise to the other signatories of the United Nations Charter. Certainly the word "pledge" in Article 56 implies an obligation and the reference to "separate" action as distinct from "joint" action indicates that the members are bound to act in accordance with the provisions of that section.

As a morally binding promise of the United States and the declared public policy of the United States the Charter provisions should serve as an aid in the interpretation of the Constitution and Statutes of the United States. Thus the California Supreme Court in *Sei Fujii* v. *State*, 38 Adv. Cal. Rep. 817, 242 P (2d) 617 (1952), while finding that Articles 55 and 56 of the United Nations Charter are not self executing, and therefore those treaty provisions do not ipso facto invalidate the alien land law of the State of California enacted in 1920, did find that the United Nations Charter represents "a moral commitment of the foremost importance." It seems fairly clear that the majority opinion of the Supreme Court of California, which held the California alien land law invalid under what it conceived to be a more modern and democratic concept of the equal protection clause of the Federal Constitution, was influenced by the "moral commitments" of the Charter. As the Court stated in 242 P (2d) at page 622:

> "The humane and enlightened objectives of the United Nations Charter are, of course, entitled to *respectful consideration by the courts and Legislatures* of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The Charter represents a moral committment of foremost importance, and *we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.*" (Italics supplied.)

This decision was in conformity with a previous decision in *Perez* v. *Lippold, supra,* which, in declaring the Cali-

BLEED THROUGH

BLURRED COPY

fornia miscegenation statutes unconstitutional, cited the Charter provisions as buttressing the conclusion reached.

It is of interest to note also that the Supreme Court of Ontario has already determined that the Charter provision of the United Nations serves to give content and meaning to the Statutes of Ontario. In the case of *Re: Drummond Wren*, (1945) Ont. R. 778, 4 D.L.R. 674, that court after referring to the Preamble of the Charter, struck down a restrictive covenant discriminating against "Jews or persons of objectionable nationality" as repugnant to the Charter. The Court ruled that under the Charter, Canada was pledged to promote "universal respect for and observance of fundamental freedoms for all without discrimination as to race, sex, language and religion."

It is significant that prior to the ratification of the Charter by Canada, a similar racial restrictive covenant was objected to on the grounds that it violated section 1 of the Ontario Racial Discrimination Act and the same Ontario Supreme Court held that though the covenant was discriminatory in its effect, it did not violate the Act. *Re: McDougal and Waddell* (1945), O.W.N. 272, 2 D.L.R. 244. In the *Drummond Wren* case, *supra, Re: McDougal and Waddel, supra,* was overruled because the court conceived that the provisions of the United Nations Charter against racial discrimination established the public policy found to be controlling and the Racial Discrimination Act constituted a legislative recognition of the public policy applied in the *Drummond Wren* case. In effect, the court held that the Racial Discrimination Act should be construed in the light of the Charter of the United Nations.

We therefore urge this Court to hold that "in origin, purpose, administration and effect" government enforced racial segregation in the public schools of the District of Columbia "does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations."

IV.

THE COURT BELOW ERRED IN NOT GRANTING PETITIONERS THE RELIEF PRAYED FOR AND IN GRANTING RESPONDENTS' MOTION TO DISMISS MINOR PETITIONERS' COMPLAINT ON THE GROUND THAT IT FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED.

Reference to the pleadings in the instant case reveals that the respondents relied upon a Motion to Dismiss on the sole ground "that the complaint fails to state a claim upon which relief can be granted."

Such a motion to dismiss, as was true of the old common law demurrer, now abolished in the District of Columbia, said in so many words that the allegations of the complaint with all legal inference conceded did not spell out a cause of action. All things alleged for the purposes of the pleadings must be accepted as being true. What then are the essential allegations of the complaint? Clearly and unequivocally the complaint alleges that the respondents with full power of allocation of minor petitioners in the public schools of the District of Columbia, failed to assign the minor petitioners to the Sousa Junior High School and actually refused them admission to said Sousa Junior High School solely because of their race or color. The Motion to Dismiss concedes the accuracy of this statement. The complaint alleges further that the respondents are construing and applying Acts of Congress so as to require them to deny minor petitioners admission to and to exclude them from the Sousa Junior High School for no other reason than because of their race or color. This allegation the Motion to Dismiss freely admits. The complaint alleges that every administrative requirement was met in seeking admission of minor petitioners to the Sousa Junior High School. The Motion to Dismiss agrees that this was done. The complaint alleges that the respondents are pursuing and have pursued the policy, practice, custom and usage of denying

BLEED THROUGH

BLURRED COPY

minor petitioners admission to and excluding them from attendance as pupils at the Sousa Junior High School and from enjoyment of the educational opportunities afforded therein solely because of their race or color. The Motion to Dismiss concedes such action on the part of the respondents. The complaint seeks not only injunctive relief to correct these violations of the petitioners' constitutional and statutory rights, but, asks the court to render a declaratory judgment to the effect that statutes enacted by Congress regulating public education in the District of Columbia do not require exclusion of the minor petitioners from the Sousa Junior High School, and, that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinctions with respect to them because of their race or color.

Facing the test to which the complaint was put by the motion to dismiss, the Court below, through Judge Walter M. Bastian, embraced the theory urged by respondents and signed an order dismissing the cause.

"ORDER

> "Upon consideration of the complaint, of the motion of the defendants to dismiss the above-entitled cause, of the memoranda of points and authorities in support of and in opposition to said motion and of the arguments of counsel for the plaintiffs and for the defendants, it is, by the Court, this 9th day of April, 1951,
>
> "ORDERED, that the above-entitled cause be, and it is hereby, finally dismissed.
>
> "(s) Walter M. Bastian, Judge."

This order is tantamount to a judicial pronouncement that an admitted statement of denial of civil rights by government officials, solely on the ground of race or color, presents no cause for relief. This order amounts to a direct statement that the defendants below correctly interpreted and put into effect statutes enacted by Congress as com-

pelling racial segregation in the public schools of the District of Columbia, and that said respondents lawfully pursued the policy, practice, custom, and usage of denying minor petitioners admission to Sousa Junior High School solely because of their race or color; and that such interpretation, enforcement, and action on the part of said respondents did no violence to the constitutional and statutory rights of the petitioners. The very making of such statements carries its own refutation.

The Court below clearly erred in not requiring the respondents to answer the complaint. The Court also erred in not issuing a declaratory judgment to the effect that no congressional statute in the District of Columbia could be properly interpreted as requiring racial segregation, and to the effect further that said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them solely because of their race or color. The Court erred in not restraining the action of the respondents in refusing to admit minor petitioners to Sousa Junior High School solely on the basis of race or color, without authority, and in violation of the constitutional and statutory rights of the petitioners.

CONCLUSION

The question whether the Federal Government has the power to compel the segregation of pupils on the basis of race or color alone in affording educational opportunities in the public schools in the District of Columbia is here presented to this Court for the first time. Here no question of equality of facilities is in issue. Here is raised the sole question whether under our democratic system and the protective covering of our Constitution, Congress or public school officials, either or both, have the power to bar Negroes from studying with whites in public schools in the District of Columbia because of their race or color alone.

BLEED THROUGH

BLURRED COPY

No reason or justification is offered by the respondents nor, in the opinion of the petitioners, can any be given, save the dubious one that the Acts of Congress compel it.

Our international relations, our concepts of liberty, our belief in democracy, cannot be reconciled with government imposed racial segregation in education in the District of Columbia. The history of our country, the loyalty of the Negro, the decisions of this Court, all require a condemnation of this un-American practice.

Governmental action has passed beyond the brink of constitutionality when it imposes disabilities upon the Negro people, loyal in war and in peace, native born citizens, limiting their liberty of choice of schools solely because of their race or color. This Court has approved of comparable federal action only when the fate of the Nation was at stake, and even then, it subjected the Government's action to a searching inquiry and laid down definite standards which the Government was required to meet. The actions of respondents in the instant case not only were not taken under such perilous circumstances, but did not meet even the minimum standards set for imposing racial distinctions under those conditions.

Wherefore it is respectfully submitted that the decree of the District Court should be reversed.

Respectfully submitted,

George E. C. Hayes
James M. Nabrit, Jr.
Counsel for Petitioners

Julian R. Dugas
George M. Johnson
Dorsey E. Lane
Harry B. Merican
Herbert O. Reid, Jr.
James A. Washington
Of Counsel

APPENDIX

APPENDIX

A.

Statutory and Constitutional Provisions in the States Where Segregation in Education Is Institutionalized.

ALABAMA

". . . Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Constitution. Article XIV, 1901.

ARKANSAS

"Duties and powers of school directors. . . . The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

"(c) Establish separate schools for white and colored persons." (Acts 1931, No. 169, Sec. 97, page 475; Pope's Digest, Sec. 11535.)

DELAWARE

"In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the States as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law." Constitution. Article X, Sec. 2, 1897.

FLORIDA

"White and colored children shall not be taught in the same school, but impartial provision shall be made for both." Constitution. Article XII, Sec. 12, 1885.

GEORGIA

"There shall be a thorough system of common schools for the education of children *in the elementary branches of an English education only*, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Constitution. Article VIII, Sec. 1, Para. 1, 1877. (Language in italics was deleted in 1912.)

KENTUCKY

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." Constitution. Sec. 187, 1890.

LOUISIANA

". . . Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years." Constitution. Article XII, Sec. 1, 1921.

MARYLAND

An. Code, 1924, Sec. 114; 1912, Sec. 63; 1904, Sec. 59; 1888, Sec. 54; 1872, Ch. 377; 1916, Ch. 506, Sec. 63.

"All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 9, Sec. 124.

An. Code, 1924, Sec. 200; 1912, Sec. 131; 1904, Sec. 124; 1888, Sec. 96; 1872, Ch. 377; 1904, Ch. 584; 1916, Ch. 506, Sec. 131; 1922, Ch. 382, Sec. 131; 1937, Ch. 552.

"It shall be the duty of the county board of education to establish one or more public schools in each election district

BLEED THROUGH

BLURRED COPY

for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 18, Sec. 207.

An. Code, 1924, Sec. 201; 1912, Sec. 132; 1904, Sec. 125; 1888, Sec. 97; 1870, Ch. 311; 1872, Ch. 377, Sub-Ch. 18, Sec. 2; 1874, Ch. 463; 1916, Ch. 506, Sec. 132.

"Each colored school shall be under the direction of a district board of school trustees, to be appointed by the county board of education subject to the provisions of Section 8 of this article, and schools for colored children shall be subject to all the provisions of this Article."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 18, Sec. 208.

An. Code, 124, Sec. 211; 1912, Sec. 142; 1904, Sec. 139; 1898, Ch. 273, Sec. 5; 1910, Ch. 210, Sec. 139 (p. 232); 1916, Ch. 506, Sec. 142.

"It shall be the duty of the county board of education in each county of the State, when in their judgment there is need thereof, to provide a suitable building or room, or rooms, connected with one of the colored schools of said county, for the establishment of a central colored industrial schools, and to provide for the maintenance of such central colored industrial school where instruction shall be given daily in domestic science and in such industrial arts as may be determined by the county board of education. One-half of the appropriation hereinafter provided shall be used for the maintenance of such industrial school."

Flack's Anno. Code of Maryland, Article 77, Ch. 20, Sec. 203.

An. Code, 1924, Sec. 212; 1912, Sec. 143; 1904, Sec. 140; 1898, Ch. 273, Sec. 6; 1910, Ch. 210, Sec. 140 (p. 232); 1916, Ch. 506, Sec. 143.

"Whenever any such colored industrial school is opened in any county the secretary of the county board of education shall report the fact to the state superintendent of schools, and he, or an assistant designated by him, shall visit said school and shall give, if in his judgment it is warranted, a certificate of approval of the conditions and the plan upon which said industrial school is conducted, to the secretary of the county board of education. The state superintendent of schools shall submit annually to the Comptroller of the treasury of the State on or before the last day of September, a complete list of such schools as are entitled to receive the special appropriation for industrial education."

Flack's Anno. Code of Maryland (1937), Article 77, Ch. 20, Sec. 204.

An. Code, 1924, Sec. 256; 1912, Sec. 193; 1908, Ch. 599.

"There shall be located in the city of Baltimore or elsewhere (if the board of education deem best) a state normal school for the instruction and practice of colored teachers in the science of education, the art of teaching and the mode of governing schools, to be known as State Normal School No. 3; the said school shall be under the control of the state board of education, who shall appoint the principal and necessary assistants; and the faculty shall consist of a principal and as many teachers as the board shall appoint. The sessions of the school shall be determined by the state board of education, who shall prescribe the curriculum of study, which however, shall include courses for the special preparation of instructors for teaching the elements of agriculture and mechanic arts, provide necessary quarters, supplies and apparatus, fix the qualifications for admission as students, the salary of the principal, assistant teachers and employees."

Flack's Anno. Code of Maryland, Article 77, Ch. 21, Sec. 252.

MISSISSIPPI

"Separate school shall be maintained for children of the white and colored races."

Constitution. Article VIII, Sec. 207, 1890.

BLEED THROUGH

BLURRED COPY

MISSOURI

"Separate free public schools shall be established for the education of children of African descent."

Constitution. Article XI, Sec. 3, 1875.

NORTH CAROLINA

"The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race."

Constitution. Article IX, Sec. 2, 1868; Convention, 1875.

OKLAHOMA

"Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children." (Const. 1907, as amended Stat. 1931, 13676.)

Constitution. Article XIII, Sec. 3.

"The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, p. 436, Art. 5, Sec. 1.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-1.

"Any teacher in this state who shall wilfully and knowingly allow any child of the colored race to attend the school maintained for the white race or allow any white child to attend the school maintained for the colored race shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), and his certificate shall be cancelled and he shall not have another issued to him for a term of one (1) year." (Laws 1949, p. 537, Art. 5, Sec. 4.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-4.

"It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution in violation hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense. (*Provided*, that the provisions of this section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis. Segregated basis is defined in this Act as classroom instruction given in separate classrooms, or at separate times. The provisions of this section are subject to Section Four (4) hereof." (Laws 1949, p. 537, Art. 5, Sec. 5, as amended by Laws 1949, Ch. 15, p. 608, Sec. 1, H.B. No. 405, approved June 9, 1949.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-5.

SOUTH CAROLINA

"Separate schools shall be provided for the children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Constitution. Article XI, Sec. 7, 1895.

TENNESSEE

"Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the Gen-

BLEED THROUGH

BLURRED COPY

eral Assembly, in all future periods of this government, to cherish literature and science. And the fund called the common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools through the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and Negro children to be received as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the colleges, universities, or academies, or from authorizing heirs or distributes to receive and enjoy excheated property under such laws as shall be passed from time to time."

Constitution. Article XI, Sec. 12, 1870.

TEXAS

"Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Constitution. Article VII, Sec. 7, 1876.

VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article IX, Sec. 140, 1902.

WEST VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article XII, Sec. 2, 1872.

APPENDIX

B.

District of Columbia Compulsory Attendance Law

"Section 1. Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session: Provided, that instruction given in such private or parochial school or privately, is deemed equivalent by the Board of Education to the instruction given in the public schools."

"Section 7. The parent, guardian, or other person residing permanently or temporarily in the District of Columbia and having charge or control of any child between the ages of seven and sixteen years who is unlawfully absent from public or private school or private instruction shall be guilty of a misdemeanor, and upon conviction of failure to keep such child regularly in public or private school or to cause it to be regularly instructed in private, shall be punished by a fine of $10 or by commitment to jail for five days, or both, at the discretion of the court: Provided, that each two days such child remains away from school unlawfully shall constitute a separate offense: Provided, further, that upon conviction of the first offense, sentence may, upon payment of costs, be suspended and the defendant placed on probation."

43 Stat. 806, 807, Ch. 140, Art. I, Sec. 1 and 7 (D. C. Code, 1951 Ed., Title 31, Secs. 201, 207).

BLEED THROUGH

BLURRED COPY